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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PETITIONER

E. E. McINNIS,
Chicago, Illinois,
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas,
WILLIAM OSMOND,
Great Bend, Kansas,
Counsel for Petitioner.

(34,434)

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STATEMENT.

This cause comes on for determination on a writ of certiorari issued to the Supreme Court of the State of Kansas. The case of The Atchison, Topeka and Santa Fe Railway Company, Appellant, against Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, Appellee, was decided by the Supreme Court of the State of Kansas on May 4, 1929. The opinion of the court is reported in Volume 128 of Kansas Reports, page 189.

The petitioner in due time filed a motion for a rehearing which was overruled by the Supreme Court of Kansas on July 5, 1929, and this constituted the final judgment in the case.

It is conceded that all the questions involved in this case arise under the Federal Employers' Liability Act, ch. 149, 35 Stat. 65. This case is governed by that Act and the principles of the common law as applied in the Courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant.

Seaboard Air Line v. Horton, 233 U. S. 492, 502.

Except as specified in Section 4 of the Act, the employe assumes the ordinary risks of his employment, and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employes.

Boldt v. Penn. R. R. Co., 245 U. S. 441, 445.

Ches. & Ohio Ry. v. Nixon, 271 U. S. 218.

If upon an examination of the record it is found that as a matter of law the evidence is not sufficient to sustain the special findings of fact, the judgment will be reversed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 474.

Toledo, St. L. & W. R. Co. v. Allen, 48 S. Ct. 215.

Atlantic Coast Line v. Davis, 49 S. Ct. 210.

Under Rule 38 of the Rules of the Supreme Court of the United States, Section 5 provides:

> "That certiorari may be granted (a) where a state court has decided a federal question of substance not theretofore determined by this court; or has decided it in a way probably not in accord with applicable decisions of this court."

This action was brought in the District Court of Reno County, Kansas, by Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased. The evidence discloses that M. G. Toops had been in the employ of the petitioner as a conductor, and as such had worked on various parts of the Santa Fe system. He was killed at the station of Rolla, Kansas, while both he and the petitioner were engaged in interstate commerce on August 13, 1926, at about 1:00 a.m., while acting as the conductor of a train running from Elkhart to Dodge City, both in the State of Kansas. Some years prior to the date of his death he had worked as a brakeman on said division, and through the station of Rolla, but this was the first trip made by him over this line for a number of years.

Rolla is a small station on the Elkhart Branch of the petitioner. At such station there is a main line, a passing switch, a house track and an elevator track; on the south side of the elevator track there is a bank of earth probably six to eight feet high. There is no cut through this elevation, the grounds on the north being level. As conductor, Toops was in charge of the train (R. 29). Shortly after midnight the train reached the station of Rolla and cars were being switched in the yards at such station at the time Toops met his death. The movements of the cars consisted in the placing of stock cars which were already at the station, cars from the train, and rearranging the location of certain grain cars. In the early movements of the crew in placing and moving cars, Mr. Toops took a part assisting in the switching of certain cars which were attached

to the train on the main track, and the coupling of which was made by Toops himself.

The last time Toops was seen by any of his co-employes or by any other person, he was standing on the platform near the station, and just before that he had a conversation with the rear brakeman, W. F. Hemphill, in which they talked about the moving and resetting of certain cars on the industry or elevator track; and at that time Toops told the brakeman to attend to the moving of these cars, and Toops said, "All right, I will look out for them," and these were the last words Hemphill heard him speak (R. 25-30). The night was a dark night. Conductor Toops was supplied with a good electric lantern and the rear brakeman had a similar lantern, while the front brakeman had an oil lantern. A few hundred feet east of the platform where Toops was last seen there is a switch running from the main line, and about 200 feet east of the station the track divided, one track, called the house track, running directly west past the station and an elevator track running a little south of the house track. After locating various cars, the remainder of the crew were engaged in placing fifteen grain cars which they intended to spot on the elevator track. These cars were run from their original position up on to the main line track, and then pushed back on to the track which divided into the house track and the elevator track. The engine was pushing these cars from the east to the west. There were fifteen of these cars. At the time Toops' body was discovered both the front and rear brakemen were on the top of

this cut of cars but neither of them was on the rear car. Each was supplied with a lantern. About 100 feet east from where the track divided there was a derail switch. While moving past this derail switch the front brakeman from the top of the train discovered a lighted lantern lying beside the track on the south side, and he immediately signalled to the engineer to stop the train, and this the engineer did as soon as possible.

It was then that the body of Toops was found under the engine tender, lying across the track, his feet to the north and his head and right shoulder over the south rail. He seemed to be lying upon his back; his head and arms were cut off, his lantern and hat were lying two or three feet to the south of the rail. At the time that his body was discovered, after stopping the train, his shoulders laid against the derail switch about 100 feet east of where the switch track left the main track (R. 41). On this side-track the ground between the ties was not filled to the surface, but there was some dirt between the ties. From the marks on this dirt it would seem that the body had been moved a short distance from the place where it was originally struck. After discovering the body of Toops the train crew and others who had come to the scene, examined the trucks of the fifteen cars which the engine was pushing. No blood was found on the rear car by any of the witnesses who examined it that night. The same witnesses examined it the next morning again. At both times marks of blood were found on all the wheels of the first fourteen cars from the engine, and also

on the wheels of the engine tender. There were also bits of flesh on the wheels of all except the rear car (R. 41). Along the track on this switch there were weeds growing. Between the rails Mr. Toops' pencil and waybills were found. The theory of the plaintiff as set out in her petition was that Toops was walking up this track, or alongside of it from the station, and that he was struck by the rear car, and knocked down, and the rear car passed over him without doing any injury, and that then the next car cut off his arm and head; that the state of the track and the weeds had something to do with the injury. (See copy of petition, R. 4-13.)

The rules of the Railway Company give the following definitions:

"*Station.* A place designated on a time-table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.

"*Yard.* A system of tracks within defined limits and provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

Section 102 of the rules reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a flagman must take a conspicuous position in front of the leading car and signal the engineman in case of need."

Section 24 reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Rule 396 required the conductor to attend personally to the switching and the testimony of plaintiff's witness Nolan was:

"If he tells me to do something as a brakeman, it is my duty to do it. If he tells Hemphill to do something, it is Hemphill's duty to do it. If he tells the engineer to do something, it is his duty to do it. Conductors have entire charge of the switching operations and the others simply work under him." (R. 20-21.) Before moving the cars which ran over Toops the engineer gave no signal by whistle, or probably otherwise, nor did he do so at any other time while switching (R. 24). While the cars which killed Toops were being moved the end of the train was not protected by the brakeman with a lighted lantern. When placing cars by a kick it is not customary for anyone to be on the cars with a lantern to warn the other trainmen (R. 42). It is not the habit to whistle while switching in the yards (R. 35).

At the close of plaintiff's evidence petitioner demurred to the evidence on the ground that such evidence did not disclose a cause of action against the petitioner (R. 40). This demurrer was overruled (R. 40).

Whereupon the petitioner introduced evidence to the effect that it was not the custom in switching on the Santa Fe, either at night or in the daytime, to have a man on the rear end of cars that were being pushed back by the engine, and introduced additional evidence that there were no marks on the wheels of the rear car but marks of flesh and blood on the wheels of all the other cars.

Photographs of tracks and derail switch are to be found at pages 66 and 68 of record. Plat of station grounds is attached as an exhibit to this brief.

The jury returned a verdict in favor of the plaintiff for the sum of $22,750.00, and also made the following findings of fact (R. 60):

SPECIAL FINDINGS OF FACT.

Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

A. No. 1. Yes.

Q. No. 2. a. Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?

b. If you answer the preceding question "Yes" state which car, if any, struck Toops.

A. No. 2. The first car on west end of the fifteen grain cars.

Q. No. 3. Were there any marks of blood on the rear of the fifteen grain cars?

A. No. 3. There was no direct evidence to show there was or was not.

Q. No. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

A. No. 4. Yes.

Q. No. 5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

A. No. 5. He knew they were to come.

Q. No. 6. Was Conductor Toops supplied with a good lantern?

A. No. 6. He had a good lantern.

Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

A. No. 7. No.

Q. No. 8. Had not Toops formerly worked on the Elkhart branch from Dodge City to Elkhart?

A. No. 8. Yes.

Q. No. 9. Had the yards at Rolla, Kansas, been materially changed since he worked on said line?

A. No. 9. We don't know.

Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. First, in not protecting rear end of fifteen grain cars; second, in engineer not sounding signal when starting; third, poor condition of track at derail switch.

Before the case was submitted to the jury petitioner had asked the court for a peremptory instruction to find for the defendant, which the court refused to give (R. 45).

The petitioner filed its motion to set aside the verdict and grant a new trial (R. 62).

Also, its motion for judgment notwithstanding the verdict (R. 61).

These motions were overruled and the petitioner appealed to the Supreme Court of the State of Kansas.

The case was duly heard in that court and the decision of the lower court was affirmed by a divided court, four of the Justices holding in favor of affirmance and three for reversal. The majority opinion was written by Justice Hopkins and the dissenting opinion by Justice Birch.

Within the time fixed by the rules of the court petitioner filed a motion for rehearing which was overruled on July 5, 1929, without further opinion of the court. The majority and minority opinions are set forth in the transcript of the record (R. 69, 85).

For a better understanding of the general situation, a copy of a plat showing the station grounds, which was used in the

trial, and introduced in evidence, is attached hereto as an exhibit. Photographs of the track at or about where Toops was killed, which were also introduced in evidence, are to be found opposite pages 66 and 68 of the record.

SPECIFICATION OF ERRORS.

The petitioner alleges that the Supreme Court of Kansas decided a Federal question of substance erroneously and not in accordance with applicable decisions of this Court and other Federal Courts in the following particulars:

1. In holding that the evidence was sufficient to require submission to the jury.

2. In holding that the evidence was sufficient to uphold the jury's finding of negligence on the part of defendant and to support the verdict and judgment.

3. In holding that it was the duty of petitioner to protect the rear end of the cars being switched, and to give a signal when starting to back the cars in the switching operation, contrary to the decisions of this Court and other Federal Courts under the Federal Employers' Liability Law.

4. In holding that the deceased did not assume the risks incident to the mode and manner in which the switching operations were being performed.

5. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which legitimate inferences could be drawn.

ARGUMENT.

Inasmuch as a somewhat lengthy brief was presented to this Court on the application for a writ of certiorari, there is but little that can be said more than has already been said in that brief. All of the assignments of error can be considered under two heads. It is the contention of the petitioner:

First: That the negligent acts found by the jury in the original trial of this case were not shown to be the proximate cause of the death of Toops.

In other words, admitting that the Company was guilty of the acts found by the jury, and that those acts were negligent, yet there is no evidence that such negligent acts were the cause of Toops' death.

Second: It is the contention of petitioner that under the decisions of this Court and of the Federal Courts generally, the acts complained of and found by the jury were not negligent acts as a matter of law.

In our statement of facts it would seem as though the statement was a very brief one, and yet we think that this statement contains all the pertinent evidence as to the essential facts attending the death of Toops. Of course evidence was introduced on various collateral matters, but we think that our statement contains the really essential facts.

I.

There Was No Evidence to Show that the Negligent Acts Found by the Jury Were the Proximate Cause of the Death of Toops.

As a matter of fact, this action was brought on suspicion, tried without evidence, and determined on surmise. Taking

all of the evidence introduced at the trial, it seems clear to us that the plaintiff failed to show many essential facts which would be necessary to entitle her to go to the jury on the issues. Whatever minor discrepancies there may be in the testimony of the various witnesses for the respondent, several things stand out very clearly.

Toops was conductor in entire charge of the train and its movements. All of the other employes were acting under his direction and subject to his instructions. Although this was his first trip for several years over this line, yet he had formerly worked on this division and was familiar with the general layout.

No changes had taken place in the tracks and the surroundings in that part of the yards. He was provided with a good electric lantern. He knew what work was to be done in the yards and talked with his train crew about such work.

He himself assisted on the first part of the switching at Rolla. His work consisted of bringing cars from the side tracks and attaching them to the main train. He talked over with Brakeman Hemphill what should be done with reference to certain grain cars which were to be spotted on the elevator track and which had to be separated from some stock cars. The rest of the train crew started from the main track close to the station platform to attend to the placing of those grain and stock cars and Toops stayed upon the station platform, telling Hemphill, the brakeman, that he would look out for the grain cars. The crew of said train then picked up the

stock and grain cars, placed the stock cars, and were proceeding to place the grain cars on the elevator track.

During the time that they were so engaged no one saw Toops or his lantern, and nothing was seen of him by any member of the train crew until his body was found under the wheels of the engine tender at a point adjacent to the derail switch. This was not upon the main line but was upon one of the side tracks south of the main track. Where was Toops in the meanwhile? What was he doing when the grain cars ran over him? Which car struck him? How did he get to the place where the cars ran over him? If he did not see that the cars were being backed up or kicked in, why did he not see them? If he did see them, why did he permit himself to be struck and killed?

These are facts which constitute the very gist of the case, and yet on none of these matters is the slightest evidence given on behalf of the plaintiff. All of these questions are left to the conjecture of the jury and of the court as to how they should be answered.

In her petition, the respondent alleged that Conductor Toops, after having coupled the air upon the five grain cars, walked to the east end of the station and to a truck which was standing there, where he remained for a few minutes going through his order sheet. That after completing this work he went east approximately 325 feet along the main-line track and to a point north of the derail on the elevator track. That he was conductor and in charge of said train, and that as such conductor it was his duty to assist in spotting cars and switching trains. That his proper position was on the right hand,

or the engineer's side, of the train, which in this case was the south side; that it was necessary for him to go south and cross the elevator track in order to reach the south side of the train, and that he carefully, cautiously and while in the line of his duty, proceeded across said elevator track to a point three or four feet east of the derail on the track, with the intention of placing himself in a position to assist at setting the cars to the elevators thereon; that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point was negligently constructed and in a dangerous condition. That the only light Conductor Toops had was the electric lantern and it was necessary for him to carefully watch his footsteps. That just as he stepped on said elevator track he was without warning struck by the west end of the fifteen moving grain cars which had been negligently, carelessly and recklessly kicked in onto the elevator track by the engine crew.

There you have plaintiff's theory of the case. In the evidence we have nothing except that Toops must have moved from the east end of the platform of the station to the point where he was killed. As to the other allegations there is absolutely no proof. What his movements were cannot be known and the trial court and the Supreme Court of Kansas, in approving the work of the jury, could not supply the lack of evidence to prove these very essential facts. The respondent alleged that Toops was struck by the west end of the fifteen moving grain cars. No evidence whatever supports this, but

all the evidence indicates he was struck by the second car, because plaintiff's witnesses and those of defendant all agree that there were no marks of blood on the rear car, but that on the second and other cars, up to the engine, marks of blood were found on the wheels, and defendant's witnesses without contradiction state that bits of flesh as well as blood were found on all wheels except those of the rear car (R. 41). This indicates that in some manner he got between the fourteenth and fifteenth cars, and was never struck by the fifteenth.

Of course, it is absolutely a matter of surmise as to how he came to be there between the first and second cars, but at least our surmise may be as plausible and as worthy of belief as that of plaintiff. It might readily be that Toops, having finished whatever work he had been doing, went forward to meet the string of cars that was to be pushed backward by the engine; that he attempted to get on the top of said cars to ride to the point where the cars were to be spotted and that he attempted this between the first and second car and that for some reason he slipped and fell between the two cars, and that he was then struck and killed by the second car from the rear.

The Supreme Court of Kansas, in the opinion written by Justice Hopkins, indicates that he could not have been attempting to get onto the cars because if he had been so doing his body would not have been found between the rails but would have been on the side of the track. This shows entire unfamiliarity with the structure and arrangement of the lad-

ders on box cars. On every box car there is a ladder at each end on the side of the car, and in addition to these ladders on the side of the car there are also ladders on the end of the car, right around the corner from the side ladders, and it might very readily be that Toops caught onto the side ladder and swung around to the ladder on the end for the purpose of reaching the top of the car; and this would thoroughly explain how it was that he may have fallen and his body might have been found between the rails. Of course, this is pure surmise, but it does not seem so improbable as the explanation given by the jury and approved by the trial court, and afterwards by the Supreme Court of Kansas.

In the course of the majority opinion written by Justice Hopkins of the Supreme Court, he makes use of the following language:

> "The deceased was not familiar with the elevator track. He approached it in the dark from the north for the first time in thirteen years. He is presumed to have been exercising due care and it may therefore be assumed that when he arrived at the track and attempted to cross it he listened for signals and heard none; that he looked for approaching cars with a light, and saw none, and that he stepped upon the defective track for the purpose of crossing over and instantly became aware that the kicked cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that in making an effort to escape he was knocked down, and as he fell forward his hat, lantern and pencil were propelled to the south side of the track. On account of the curve in the track his lighted lantern (which was thrown or fell out of his hand), could not be seen by the crew. The position of the body indicates that he was knocked down by the west end of the moving grain cars.

His train book, containing thirty-four or thirty-five bills, dropped into the center of the track, between the rails, and was lying two or three feet east of his body."

The various assumptions made by the Supreme Court *are* mere surmises, and are without any evidence whatever to support them. The statement made by Justice Hopkins corresponds very largely with the theory of the respondent in her pleadings and evidence. While it possibly might be true that these were the actual facts, yet this court cannot say, nor can any court, that these were necessarily the facts. Any other theory, equally plausible, would destroy the inferences that were made by the Supreme Court of Kansas. Take, for instance, the idea or theory that he was struck by the rear car in the train. He might have fallen, as suggested by the court, on account of the fact that there was very little dirt between the ties and a good many weeds and thistles. There is no evidence that they in any way interfered with his crossing over the track, if he were so doing. He may have been intending to cross over the track, if we find that he was really struck by the rear car, of which fact there is no evidence; or he may have stumbled over a rail instead of a tie or on account of being entangled in the weeds. No way has yet been discovered of operating a railroad without the use of rails, and one could just as easily fall over a rail as stumble on a tie that was insufficiently ballasted. One theory is just as plausible as another as to how he might have got under the train. In the opinion of Justice Hopkins he says:

"Inasmuch as he had come south to cross the track it is natural to conclude that when he was struck his

> pencil and lantern were thrown out and away from the track. His train book with the bills in it was found in the center of the track between the rails and east of his body, indicating that he was carrying the train book in his left hand at the time he was struck and dropped it in the center of the track. Had he attempted to climb on the train and fallen off, the train book would undoubtedly have been found in his pocket."

If such inferences can be made in the trial of a law suit, evidence would not seem to be a necessary part of the trial.

In another place in his opinion, the Supreme Court of Kansas says:

> "He did not know that they would come silently down upon him, without a white light on the leading car."

We desire particularly to call attention to the use of the word "silently." There is absolutely no evidence to show that the cars were moving silently. Such a thing as a silent movement of cars is hardly conceivable, and especially would this be the case where the cars were coming, as they were in this case, around a rather sharp curve. The friction of the wheels on the rails always produces a noise that can be heard from a great distance. Every time a car passes from one rail to another a distinct click can be heard. Whenever cars bump against each other in making up a train a noise is distinctly heard from the concussion through the entire length of train. The night was a dark night. This would undoubtedly interfere with vision, but certainly it would not interfere with hearing. The hour was a little after midnight and there would be nothing to interfere with the transmission of sound. As we have said, moving cars always make a sound and this is

especially perceptible in the late hours of the night. At that time one can hear in the city the approach of street cars and the movement of trains at a considerable distance from where one lies abed. We can only surmise, as the court below seems to have done, that Toops was unaware of the approach of the cars which ran over him. Of course, if Toops was aware of the approach of the cars, the absence of a brakeman and a lighted lantern on the rear of the approaching cars, or the failure of the engineer to give any signals, would make no difference. The object of these regulations, if there are such regulations, would be simply to apprise one of the presence and approach of the cars, and if he actually knew of this, there would be no occasion for signals.

The jury specially found that Toops had a good electric lantern, and then they made an additional finding; that Toops could not have seen the approaching cars by the aid of his lantern. There is not a syllable of evidence to support this finding. One of the objects in furnishing trainmen with a lantern is that they may be enabled to see approaching cars. Of course, they are also used for signals, but just as much to enable the one using them to go among cars without receiving injury. The rear brakeman, Hemphill, was also supplied with a good electric lantern and the front brakeman, Nolan, was supplied with an oil lantern. The conductor, Toops, Hemphill and Nolan, by the aid of these lanterns had assembled cars for switching, had made couplings, had changed switches, and had done all of the things ordinarily done in the operation of

switching. If the brakemen were able to do these things as indicated, it is impossible to see why Conductor Toops was not able to do the same. With the aid of his lantern, he had assisted in the movement of cars and in attaching them to the train on the main track at an earlier time in said night. To do this it was necessary for him to see the approach and movement of the cars he was to handle and the only way that he could see them, aside from the starlight, was by the aid of his lantern; and it is certainly presumptuous, in the absence of evidence, for the jury to say that Toops could not have done the same thing.

Admitting, however, for the sake of argument, that the jury was right in finding that Conductor Toops was not able to see the approaching cars by the aid of his lantern, then it would seem to us that the final analysis of the situation would be that the accident was due to the inefficiency of the lantern and Toops' consequent inability to see the cars approaching and possibly the surrounding situation as to tracks.

Toops used this lantern at least all the time after the train stopped at the station of Rolla. If the lantern was inefficient and was not able to do what a lantern is intended for and is expected to do, then no one was more aware of the inefficiency of the lantern than Toops himself. Toops, in using an ineffective agency, of which he must have had knowledge, would seem to us, under the rule laid down as to master and servant, to have assumed a risk of his employment, and therefore would not be entitled to recovery.

It is therefore seen that the three grounds of negligence found by the jury—the failure to protect the rear end of the grain cars, the failure of the engineer to give a signal when starting to back cars around the curve and through the cut, and the poor condition of the track at the derail switch—were not shown by the evidence to have had anything to do with the death of Toops.

In the opinion of Justice Hopkins he lays considerable stress upon a distinction which he finds between stations and railroad yards. He admits that petitioner's argument would be entirely correct and decisive if it applied to railroad yards. He quotes the rules of the company and definitions therein:

> "Station.—A place designated on the time table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."
>
> "Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table, or by train order, may be made, subject to prescribed signals and regulations."
>
> "SEC. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."
>
> "SEC. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

These last two rules, he says in effect, do not apply because the place where the accident occurred was not a yard but was a station. The confusion in his mind, in our opinion,

seems to have arisen from the fact that stations and yards are defined separately. Certainly the definition of "yard" as quoted above covers the situation at Rolla. There was a place for the making up of trains, storing of cars and other purposes and movements not authorized by the time table or by train orders might be made there. It seems to us that the trouble arises from the idea that the rules of the railroad classify stations on its tracks; that is, that it calls some of them "stations" and calls others "yards." There seems to be no basis in the testimony nor in fact for such a classification.

In performing switching operations, the fact that the yards might also be at a station, it would seem to us, would make absolutely no difference. The rules do not seem to attempt to distinguish stations from yards.

There is nothing to prevent having yards at stations; in fact, almost every station has switches, sidetracks and yards in which to do switching, storing of cars, and other matters incident to the operation of a railroad. The station, as a station, has one purpose, principally the control of trains by telegraphic orders; the yards have another; and it seems rather forced to say, as the court in Kansas does say, that Rolla is a station, and not a yard, and therefore not covered by the rule with reference to switching, regardless of the purpose for which the tracks are used. Whether the yards be large or small, the rule with reference to protecting the other members of the switching crew from injury would probably be the same. It is a matter of construction of the

definition and certainly the definition of "yards" would cover the station at Rolla. If there is any ambiguity about the rule, the practical construction placed upon it by trainmen, as shown by the evidence, was that it was not the custom in handling and switching cars at stations to observe the rule which might be applied to "stations," and not the rule as to "yards." That is, it was not the custom to have a lighted lantern on the rear of the car, or brakeman located there, except where the switching was going on over a highway crossing. It is true that there was a highway crossing over the station grounds at Rolla, but it was several hundred feet west of the place where the accident occurred.

A common-sense definition of the word "yards" is to be found in *George v. Quincy, O., & K. C. R. Co.*, 139 Mo. Ct. Ap. 283. The matter is summed up in the first paragraph of the syllabus:

> "Rev. St. 1909, Sec. 3163, requires railroads to block all switches, frogs, and guard rails 'in all yards, divisional and terminal stations, and where trains are made up.' HELD, that the word 'yards' was not limited to yards maintained at divisional or terminal stations, or where many parallel tracks are maintained, and cars habitually switched, but included a way station at which there was a system of tracks where cars could be cut out of a train and stored, loaded or unloaded, or delivered to connecting lines, and where switching was customarily or habitually, though not constantly, carried on."

In the course of the opinion in the George case, Justice Trimble uses the following language:

> "Everyone knows that every railroad station has a 'yard' of its own, by which is meant a place or piece of

> ground, usually within certain reasonable limits, though not necessarily inclosed, surrounding the depot or station, and used to switch and stand cars therein for the purpose of loading or unloading freight handled at that point, and for other purposes connected with the railroad business transacted at such station. Such place, in ordinary language, used by the persons in charge of such stations, as well as by the public doing business thereat, is termed a 'yard.' And in it there is always more or less switching to be done in order to deliver and take away cars at said station. . . ." (p. 154.)

The following principles applicable to cases arising under the Federal Employers' Liability Act have been enunciated by the Supreme Court of the United States.

In case of accident to an employe, he must prove not only the cause which operated to produce the injury, but also some negligent act or omission of the employer in which the cause of injury originated. The fact of accident does not warrant an inference of negligence. Negligence is an affirmative fact which must be established by evidence. When the evidence leaves a cause of injury in doubt, and any one of several things may have been the cause, the jury may not choose one of them by guess, and find negligence without a satisfactory basis for the conclusion. With the presumption that the injured employe used due care goes the correlative presumption that the employer used due care. This presumption must be overcome by evidence. When circumstantial evidence is relied on to prove a fact, the circumstances must be proved. The circumstances must not themselves be presumed, and one presumption cannot be built upon another.

Patton v. Texas and Pacific Ry. Co., 179 U. S. 658.

Looney v. Metropolitan R. R. Co., 200 U. S. 480.

Chi., Rock Island & Pac. Ry. v. Bond, 240 U. S. 449.

New Orleans & N. E R. R. Co. v. Harris, 247 U. S. 367, 371.

C., M. & St. P. Ry. v. Coogan, 271 U. S. 472.

In the Patton case, in the syllabus, it is said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish, that the employer has been guilty of negligence: . . . in the latter case, it is not sufficient for the employe to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

In the Looney case, it is held that in an action for damages for personal injuries, while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part

of the plaintiff. There is equally a presumption that the defendant performed his duty.

In the Harris case, it is held that rights and obligations under the Federal Employers' Liability Act depend upon it, and the principles of the common law, and negligence is essential to recovery. In the course of the opinion the court says:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employe resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. . . ."

The Coogan case is the one particular case upon which petitioner relied in the trial of this case before the jury and also in its contention before the Supreme Court of Kansas. In that case at the close of the evidence the petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of the petitioner, and that any verdict for respondent would be based upon speculation and conjecture, and in the decision this contention on the part of the petitioner was sustained.

Again, the court holds that the rights and obligations of the petitioner depend upon the Employers' Liability Act and applicable principles of common law as interpreted by the Federal courts; that the Supreme Court should examine the record and if it is found that, as a matter of law, the evidence is not sufficient to sustain the finding, and that the carrier's negligence was not the cause of the death, judgment should be reversed. The contention of the respondent was

that a stretch of pipe line about fifteen feet in length had been loosened and bent three or four inches toward the rail, and that this condition of affairs had lasted for some months. The court says:

> "The evidence is sufficient to warrant a finding that there was a breach of duty in this respect. But the precise question for decision is whether the condition of the pipe caused or contributed to cause the death of deceased. . . . "

and the court held that there was not sufficient evidence connecting the injury with the negligence so found. Quoting from the decision, the court says:

> "It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. . . . There is nothing to show that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.
>
> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. . . . When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of re-

spondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture."

Giving the foregoing decisions and others their full force and effect, it would seem to us that upon this branch of the case there must be a holding that even if the so-called acts of negligence had been proven, yet in the absence of proof that the injury was due to any one of the so-called acts of negligence the decision must be in favor of the petitioner.

II.

Under the Decisions of this Court and of the Federal Courts Generally, the Negligent Acts Complained of and Found by the Jury were not Negligent Acts as a Matter of Law.

But there is on the other branch of the case a very serious question whether the negligence found by the jury in answer to special question No. 10 would constitute actionable negligence. Question No. 10 submitted to the jury was as follows:

> State fully in what the negligence of the defendant consisted, if any.
>
> Answer First. In not protecting the rear end of the fifteen grain cars.
>
> Second. In engineer not sounding signal when starting to back cars around curve and through cut.
>
> Third. Poor condition of track at derail switch.

The second ground of negligence, that the engineer did not sound signal when starting to back cars around curve and

through cut, has no evidence to support it so far as "through cut" is concerned. It is true that the engineer was sending the cars around a curve, but, as to the "cut," the evidence shows that on the south side of the track the ground was higher, possibly six or eight feet higher, but not that there was a cut there, and the north side of the track was the natural surface of the ground, the same as the rest of the yards, and a person looking from east of the depot toward the track would not have his view impeded by anything on the north side of the track. This will be plainly seen in the photograph, attached to the transcript of the record.

In the very recent case of *Kansas City Southern Railway Company v. Jones*, 276 U. S. 303, the court says:

> "No one saw the death, but the body was found between the main track and a parallel track and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as the time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed

in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. . . . "

The latest expression of the Supreme Court of the United States is to be found in the case of *Toledo, St. Louis & Western R. R. Co. v. Allen*, 276 U. S. 165, and inasmuch as all of the principles involved in actions like the present one are somewhat fully discussed, we quote quite freely from this case:

"October 27, 1922, petitioner's railway system was being operated by a receiver as a common carrier of interstate commerce. Respondent was a car checker in the service of the receiver; and, while employed in such commerce in petitioner's railroad yard at Madison, Illinois, he was struck and injured by a shunted car. He brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Employers' Liability Act, U. S. C., Tit. 45, c. 2, Section 51. . . .

"The yard where plaintiff was injured included a lead track, and connected with it, a number of parallel switch tracks, the centers of which were about twelve feet apart. Plaintiff had been regularly employed there as a car checker for about eighteen months, and his hours were from 11 in the evening to 7 in the morning. His work required him to be in the yard while switching was being done and to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains.

"At the time of the accident he was checking a string of cars that had been placed on Track 5, and was between it and Track 4, about 125 yards from the lead. A switching crew was at work in the yard. The engine was on the lead attached to from twenty to twenty-five cars that were between it and Switch 4. Two cinder cars were

detached from the end while the string of cars was being pushed by the engine.

"They were shunted by means of the switch to Track 4, and by their momentum moved to the place where plaintiff was struck. The yard was not artificially lighted. It was an ordinary starlight night, without moon. The shunted cars moved at moderate speed—four to six miles per hour—and made noise enough to be heard at a distance of one or two car lengths. They were unlighted and unattended, and no person warned plaintiff of their approach.

"The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employes while engaged in interstate commerce, and superseded state laws upon that subject. *Second Employers' Liability Cases*, 223 U. S. 1, 55. This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff can not recover in the absence of negligence on the part of defendant. *Seaboard Air Line v. Horton*, 223 U. S. 42, 502.

"And, except as specified in Section 4 of the Act, the employe assumes the ordinary risks of his employment, and when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employes. *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441; *Ches. & Ohio Ry. v. Nixon*, 271 U. S. 218. If, upon examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. *C. M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, 474. . . .

"Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. *Missouri Pacific*

Railroad Co. v. Aeby, 275 U. S. 426; 48 Sup. Ct. R. 177. The rule of law which holds the employer to ordinary care to provide his employes a reasonably safe place in which to work did not impose upon defendant an obligation to adopt a rule for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 529.

"Carriers like other employers, have much freedom of choice in providing facilities and places for the use of their employes. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle v. Milwaukee Railway*, 122 U. S. 189, 194; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *Washington, etc., Railroad Co. v. McDade*, 135 U. S. 554, 570. . . .

"And the Court authorized the jury to find the defendant negligent in failing to cause the engine bell to be rung and in sending the cars along Track 4 without a light and unattended. The opinion below declares that the starting or running of the switch engine without ringing a bell or blowing a whistle was evidence of negligence; and that if, according to the practice, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or knowledge of such custom or practice on his part, the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk.

"Obviously the ringing of the bell when and after the cinder cars were uncoupled or when the engine started or while it was running would not have been useful as a warning to plaintiff. When the cars were detached, he was from three to four hundred feet from the lead track and the engine was at the other end of the string of cars. The decision on this point is contrary to the rule followed in the Federal Courts. *Aerkfetz v. Humphreys*, 145 U. S. 418, was a case presenting a situation similar to that here involved. It is there said (p. 420): 'The ringing of

bells and the sounding of whistles on trains moving forwards and backwards, would have simply tended to confusion.' And see *Rosney v. Erie R. Co.*, 135 Fed. 311, 315; *Connelley v. Pennsylvania R. R. Co.*, 201 Fed. 54, 57.

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it can not be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz v. Humphreys, supra.*

"In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. *Boldt v. Pennsylvania R. R. Co., supra; Ches. & Ohio Ry. v. Nixon, supra; Randall v. Baltimore & Ohio R. R. Co., supra; Tuttle v. Milwaukee Railway Co., supra.*

. . .

"There is no claim that he was not about his work in the usual way or that he could not have avoided the cars if he had known they were coming. A slight movement on his part would have been enough. When the engine pushed the string westerly along the lead to give the cinder cars momentum, the field man was on the south side of the lead and turned switch 4 to shunt them on that track. There is no evidence that he saw plaintiff or knew where he was while the switching movement was being made.

"The foreman of the crew was on the north side near the westerly end of the string of cars. He lifted the coupling pin to detach the cinder cars and gave signals for the starting and stopping of the engine in order to

give them the desired impulse. He saw the lantern carried by plaintiff on the north side of the cars on track 5 and assumed that plaintiff was at work there. Plaintiff's son was the other switchman. He was on the north side near the middle of the string of cars and received from the foreman and transmitted to the engineer the signals for the starting and stopping of the engine. He also saw plaintiff's lantern. Neither engineer nor foreman knew where plaintiff was.

"The mere fact that the foreman and plaintiff's son saw the lantern and knew that plaintiff was checking cars on track 5 is not sufficient. There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central Railroad Co. v. Ackerman*, 144 Fed. 959, 962.

"In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard, or to warn or to take other steps to protect him."

In *Elliott on Railroads*, Vol. 3, Second Edition, paragraph 1258, it is said:

"Even as to employes the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yards, for the purpose of notifying such employes, who are familiar with the operation of the yard."

We can but think that the feeling of the writer of the opinion of the Supreme Court of Kansas had more or less to do with the decision of that Court. In the course of his opinion (R. 84), he says: "The main contention of the defendant is that there was no *prima facie* case for a jury, a contention we can not sustain. This is not one of those cases

where we can say as a cold-blooded matter of law that there was no negligence and no liability."

We desire to call attention to the recent case of *Burnett v. Penn. R. Co.*, 33 Fed. (2d) 579, 580, where the court says:

> "Even if it might be thought that plaintiff's proofs were consistent with the existence of a brake defect as the cause of this accident, they were at least equally consistent with the existence of some other effective cause. In such case there is no question for the jury." (Citing cases.)

Our own Supreme Court of Kansas apparently does not feel too confident of the law. In the case of *Caples, Admrx. v. A. T. & S. F. Ry. Co.*, from the opinion handed down December 7, 1929, and not yet officially published, we quote three paragraphs of the syllabus.

> "2. An experienced employe familiar with the yard and with the continuous operation of switching cars therein without lights or lookouts on the ends of cars, is required to take precautions for his own safety and has no right to expect the protection of the railroad company that should be exercised towards passengers or others who may have come on their premises for the transaction of business.
>
> "3. Familiar as the car checker was with the yard and the switching of cars there in the customary way, he had no right to expect that there would be lights or lookouts on the switching cars or that other warnings of approach would be given.
>
> "4. Those in charge of the switching operation had a right to believe that the car checker as well as other employes with the knowledge of the yard and the switching of cars therein, would take precautions for their own safety in the ordinary switching operations and would not rely on warnings to be given by those in charge of the switching movements."

The analysis of the situation in the dissenting opinion of Justice Burch seems to us to be a clear and accurate statement of the situation, and we quote from the same (R. 85-93):

> BURCH, J. (dissenting): The action was based on the federal employers' liability act. The case is governed by federal law. The judgment must stand up, if at all, under the decisions and the method of review of the Supreme Court of the United States. The opinion of this court makes no reference to decisions of the Federal Supreme Court touching any phase of the case except the subject of assumption of risk, which I do not regard as important. If I read the federal decisions correctly, the judgment of the district court should be reversed.
>
> The jury found defendant was negligent in not protecting the rear end of the fifteen grain cars. The opinion of the court approves the finding because neither brakeman nor white light was on the west end of the grain cars, and Conductor Toops had a right under the rules to believe and rely on the fact that one of his brakeman would ride the kicked-in grain cars, the brakeman taking a position on the west end of the first car, where his light could be distinctly seen. The rules supposedly creating this duty were rules 24 and 102.
>
> Conductor Toops knew perfectly well that no brakeman with a light would be on the end grain car to show him the string of grain cars was coming, because he planned the work so his brakemen would of necessity be otherwise employed, and in planning the work he was the company.
>
> The first work done was to get five loaded grain cars from the elevator track and put them into the train. Toops made the air coupling. The train was then made up, but there was switching to do. Toops and his two brakemen went over the switch list. The instructions were to get fifteen empty grain cars, which were behind twelve stock cars, off the passing track and place the grain cars at the elevators for loading. The head brakeman went east with the engine to open and close switches and make the engine couplings. The rear brakeman

stayed behind to make the coupling of cars back at the road crossing. This done, the engine, stock cars and grain cars all went eastward, and both brakemen went with them. The grain cars were to be kicked in on the elevator track, the stock cars were to be replaced on the passing track, and the engine was then to be attached to the east end of the string of grain cars in order to push them to the elevators. The head brakeman's duties did not contemplate that he should leave the engine standing idle, get on the rear grain car, ride it back to show Toops the string of grain cars was coming, and then walk back, to throw the switches so the stock cars could be replaced, and after that the engine could be attached to the grain cars. The rear brakeman was obliged to take care of the stock cars after they were kicked back on the passing track, and he could not get on the rear grain car and ride it back to show Toops the string of grain cars was coming, without holding up the work. Toops had but two brakemen. The train was to be put over the road that night, and it would have been the essence of nonsense for Toops to take either brakeman from his proper employment and assign to him the duty of riding the rear car of the string of grain cars, lantern in hand, back to where Toops was waiting for them, just to show Toops they were coming. That practical application of the rules required no such absurdity was disclosed by the following testimony for the plaintiff:

"And while Mr. McHenry was bringing the engine through the stock track, I was standing at the crossing on the north side of the main line, talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut, and I told him they were, and that I would kick them into the elevator track. He said, 'All right, I will look out for them'."

Toops knew perfectly well that neither of his brakemen carried two lanterns, one to work with and the other to be put on the rear end of the string of cars to show Toops they were coming. Of course there was no need of a light to protect the public crossing west of the sta-

tion, because Toops was on guard looking out for the cars some 300 feet east of the station.

It was not Toops' duty merely to assist in the switching operations. Rule 396 required him to attend personally to the switching, since he had no unloaded way freight to check. He was in full charge of the switching operations, not theoretically, as a matter of rule, but as a matter of fact. One of plaintiff's witnesses testified:

"If he tells me to do something as a brakeman, it is my duty to do it; and if he tells Hemphill to do something, it is Hemphill's duty to do that; and if he tells the engineer to do something, it is the engineer's duty to do it. The conductor has entire charge of the switching operations, and the others simply work under him."

The result is, protection of the rear end of the fifteen grain cars goes out of the case as a basis of recovery, because the company was not negligent toward Toops in that regard.

The second ground of negligence found by the jury was failure of the engineer to give a signal when starting to back the cars. What was the purpose of such a signal? Manifestly, the purpose was to apprise a person who might not anticipate a backward movement of the train that such a movement was about to begin, and would result in sending cars in on the elevator track.

At the time the signal should have been given the end of the string of grain cars was east of the junction of the elevator track with the main track, the stock cars were east of the grain cars, and the engine was at the east end of the string of stock cars. The curve and the embankment intervened between the end car of the string of grain cars and the place Toops chose to meet it. A sounded signal would be far away. Time would elapse before the end car would reach Toops and, signal or no signal, he would necessarily be obliged to be on the lookout for approach of the expected cars. So rule 483 applied to Toops. That rule required him to be vigilant and cautious, and not trust alone to signal or rule of safety. He had sent the engine and brakeman eastward for the express purpose of kicking the grain cars upon the ele-

vator track. They were certain to arrive after sufficient time to complete the preliminary operations and then perform the kicking operation. There was in fact delay. The engineer gave the cars a kick, and stopped. The slack ran out, and it was discovered the grain cars were not detached. New signals were given, a second kick was made, and the grain cars were cut off. In anticipation of their approach, Toops went to a proper place to meet them. When the end car approached him it was moving slowly, because inertia very soon brought it to rest, and the presumption is Toops was vigilant and cautious, and watched carefully for approach of the very cars he went to the switch track to meet.

The jury found that Toops had a good lantern, but the jury found he could not see the cars with it (finding No. 7). The two brakemen had no difficulty in finding cars and switch stands and safely making couplings with their lanterns, one of which was like the one Toops carried. Toops said he would look out for the grain cars. As indicated, he knew there would be no brakeman with a lantern and no white light to show him the end car of the fifteen grain cars. Signal or no signal, he had to find the grain cars with his lantern. He knew and the jury knew he was equipped to do so, and the seventh finding of the jury would be ludicrous if the subject to which it relates were not so serious. The court's opinion properly indulges the presumption that when Toops arrived at the switch track he looked for the approaching grain cars, but the court's hypothesis that he did not see the end of the grain car which immediately struck him is quite as unsupported by evidence as the jury's finding.

Under federal law the employer must not only be negligent, but the proof must show that the negligence caused the injury. (*St. L. & Iron Mtn. Ry. v. McWhirter*, 229 U. S. 265, 281; *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 478.) In this instance there is no evidence that failure of the engineer to give a signal before he kicked the grain cars upon the elevator track had anything to do with the accident.

The third element of defendant's negligence found by the jury was the poor condition of the track. A photo-

graph of the track taken the day after the accident is in the record. The question fairly arises whether the jury was competent to declare defendant negligent in providing the kind of track disclosed by the photograph and the testimony, and whether Toops did not assume the risk of using skeletonized elevator tracks at small stations on the Dodge City-Elkhart branch line; but waiving this matter, there was no evidence the condition of the track had anything to do with Toops' death.

Nolan said he was slow about making the cut for the first kick because of the condition of the track—bad footing. The conclusion that Toops was killed because of bad track is on a par with the reasoning of a witness for plaintiff. The witness opined the accident might have been caused, not by lack of ballast, nor by weeds, nor by skeletonized track, but because of a spike not fully driven down. The witness testified:

"He could have caught his foot on a spike. There is a spike sticking in there just close to where he laid on the inside of the rail. . . . I didn't see anything to indicate that he fell on a spike, but he was there, and the spike was there."

All the proof there is in the record that the condition of the track caused the accident is that the track was bad and the man was found dead upon it. To conclude the condition of the track caused the accident involves a spurious use of the *res ipsa loquitur* doctrine instead of speculation, in determining cause, a method specifically condemned by the Supreme Court of the United States in an opinion published April 15, 1929. (*Louisville & Nashville Railroad Co. v. Chatters*, Advance Opinion No. 414, p. 8.)

The court's explanation of the accident is as speculative as it is schematic. It is assumed without evidence that Toops did not reach the place of the accident until just as the rear grain car arrived. Under this assumption Toops would have run into the side of the string of grain cars but for the failure of the first kick of the engine to send them in on the elevator track. To the first assumption

is added another, having no basis in the evidence, namely, that Toops stepped on the track in front of the moving end car, which he looked for and could not see, on his watchful way to the south side of the elevator track. Then follow assumption after assumption, until the fanciful account of the accident is complete. The end of the first car struck Toops; his agility was handicapped by the skeletonized track, his feet were trapped, and he was knocked down; he threw his lantern and pencil to a place beside the track, with his right hand; he dropped his train book, which he held in his left hand, between the rails; then with his hands free, he was helpless, and suffered fatal mutilation. Attorneys for plaintiff go so far as to give us the workings of his mind while facing his doom. They say he threw his lantern to the side of the track for an emergency signal, which nobody could see, and the court does not relinquish the view that Toops actually threw his lantern into the weeds beside the track.

It will be recalled that Toops' hat was found beside the track with the lantern and pencil. Did he throw his hat there as he did the lantern and pencil? If so, with which hand? Or did the hat fall there, and if it did, why may not the lantern and pencil have fallen there?

The lantern was from three to four feet south of the south rail of the track. The hat was nearer the rail, and the pencil still nearer. Conceive of a yardstick poked under the overhang of a large-size grain car, with one end against the rail. The other end of it would be in the midst of the articles mentioned, and it is just as reasonable to assume that the articles fell at the side of the car as that they were thrown from a place on the track at the end of the car by a man suddenly knocked down.

The court says that if Toops had been on the car and had fallen down, his train book would have been in his pocket. One easy guess is that maybe the train book was in a pocket when the terrible encounter commenced which ended with the headless body jammed against the derail.

The court says that if Toops had attempted to climb on the moving cars and had fallen, he would naturally

have fallen outside the rails. I am not familiar with the law of nature which would prevent him from falling partly outside the rails and partly between the rails.

At some time Toops left the station platform, where he was last seen, and went to the switch track, where he was killed. He was in the midst of unfamiliar surroundings. The night was very dark, and after traveling about 100 yards, he was to approach the elevator track for the first time in thirteen years. Just why he should carry his pencil in his lantern hand, and his trainbook with thirty-four or thirty-five bills in it in his left hand, to meet a cut of kick-in cars which he was to take care of, has never been explained. Book and pencil in separate hands could not help him find the way, or find the cars on the switch track, or be of use to him when he reached the switch track, or be of use to him when he began to do what was necessary to take care of the cars. The articles might be a hindrance to him in doing his work, something which an experienced and prudent man would guard against. A common sense view would be that when he was ready to go he stuck his pencil under his hat the way conductors do, put his billbook in his pocket, took his lantern in the hand he used by force of habit, and proceeded to the place where he had planned to be. Anyway, there would have been nothing fantastical about this kind of conduct, and if he did conduct himself in that manner, it requires no more invention to explain what followed than appears in the court's opinion.

To render the court's theory of the accident tenable, it is indispensible that Toops should have been struck by the west end of the west grain car, knocked down and then killed. The theory has been that he was killed practically as soon as he was knocked down. Some physical facts rationally considered refute the theory. Plaintiff's witnesses testified there was no blood on any of the four south wheels of the west car, and that there was blood on the south wheels of all other grain cars. In plaintiff's brief it is said that, "blood was found on all of the cars except the first car on the west end of the string of fifteen cars."

The jury's evasive answer to the third interrogatory discloses the candor which it displayed in disposing of the case. A witness who examined the car wheels both the night of the accident and the next morning testified there was flesh as well as blood on the wheels, and nobody corrected or contradicted him. His testimony is important, and follows:

"We examined the trucks of the freight cars that night, and then made another examination the next morning. We found no marks of blood on the first car. The first marks of blood we found on them were on the west end, west wheel, on the south side of the second car. Following these cars up to the engine, we found blood on every wheel, blood and flesh on every wheel up to the tender, up to and including the tender.

"I crawled under the cars the next day, just under the first two. I made this examination at the request of Mr. Shull, the claim agent of the Santa Fe, and Doc Ellis. It was made in the morning. Doctor Ellis was the doctor that was called before we moved the body, before anybody would touch it. The doctor requested that we look the ground over thoroughly, because we would all be called, and that we would more than likely be called on the coroner's jury."

To prevent the jury from drawing from the physical facts the natural and inevitable inference that Toops was killed by the first wheel of the second grain car, plaintiff produced a physician who gave the following testimony:

"In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

When Toops was killed the grain cars were moving so slowly they stopped within a short distance. The head brakeman testified as follows:

"To the best of my judgment, the west end of those fifteen cars was about three or four car lengths west of the derail."

This testimony must be true, because the evidence was uncontradicted that the east car of the string of grain cars stopped within two or three car lengths of the elevator track switch, and the sketch, drawn to scale, submitted as illustrative of the station grounds, indicates the string would not be long enough to reach five car lengths beyond the derail.

It is a matter of common knowledge that the head is supplied with blood by large arteries ascending on each side of the neck, that the blood is returned by large veins, and that arteries and veins have branches and ramifications supplying the various tissues. Toops' head was severed, and his right arm was mangled and severed. To do this it was necessary that the car wheel pass through arterial and venous blood. The physician would make of a car wheel and a steel rail such deft instruments that crushed major arteries and veins in crushed tissues would be sealed up so that no blood could escape—immediately. The doctor's testimony did not cover the subject of crushed tissue adhering to the wheel that crushed it. We have then this operation: The first car wheel does its dexterous work. The car moves on five or six feet—whatever the distance between the wheels of the front truck. The second wheel of the front truck comes through clean because the blood cannot start to flow. The car rolls slowly on some twenty-five feet—or whatever the distance between the trucks of a 40-foot grain car. The first wheel of the rear truck passes over the place of severance. Still no bleeding. The car moves on, and the last wheel of the car comes in contact with no blood. The car rolls on for the distance between the rear wheel of the front car and the front wheel of the second car. Then is the time for bleeding to commence and flesh to adhere, and they do so.

In cases of this character the Supreme Court of the United States examines the record, determines for itself what is substantial and what is unsubstantial testimony, and does not permit a jury question to be raised by unsubstantial testimony. (*Gulf, etc., R. R. v. Wells*, 275 U. S. 455). I fear the Supreme Court of the United

States would not regard the physician's testimony as making a substantial contribution to the solution of the case.

Since the theory that the first car killed Toops forces the facts, the court falls back on the second car. Toops comes down to the switch track, and fortuitously steps on the track just as the west end of the first car reaches the exact locality. The west end of the first car strikes him, and he makes distribution in space of lantern, pencil, hat and train book. He is knocked down, but all the first car does is to push him maybe two or three feet, possibly roll him some. The second car then comes along and kills him. Besides nullifying the court's approval of the doctor's testimony regarding postponed exudation of blood, this will be a great surprise to plaintiff's attorneys.

The petition alleged that Toops was struck by the kicked-in cars, was knocked to the ground between the rails at a point three or four feet (two or three feet) east of the derail, and his body dragged until his shoulders rested against the derail. The petition then stated:

"That his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; . . . "

The brief for plaintiff contains the following, printed in italics: "The petition contains our theory of the case, and the evidence amply sustains our theory."

The brief does depart a little from the petition. The petition states that Toops was knocked down, that his body was dragged, but that his head and arm had "fallen" so they were severed. The brief says:

"His head fell over the south rail, as did his arm. We are not clear as to whether the front wheels severed his head and arm, or whether it was the rear wheels of the first car."

There was evidence the body was dragged westward a little way, and that the severed arm lay about three feet

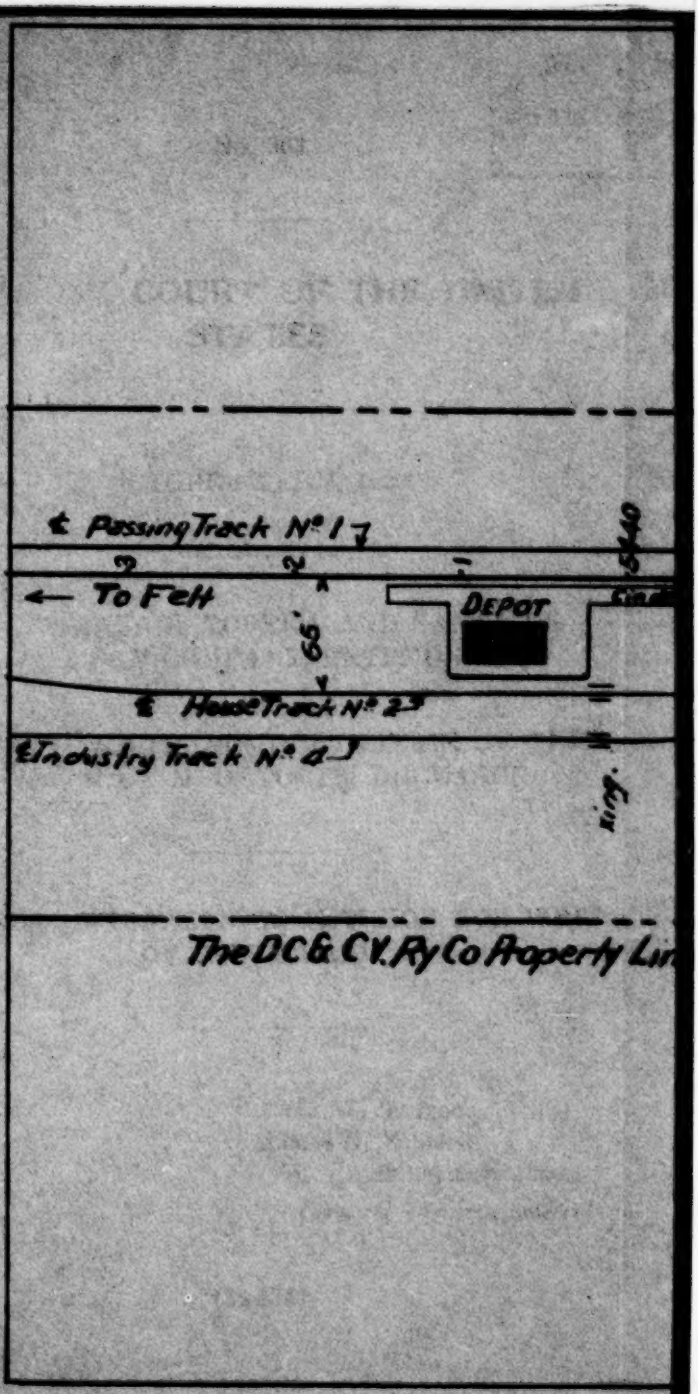
west of the severed head. There is not even a scintilla of evidence that the first car did the dragging. Finding the court's conjecture respecting a vital matter at odds with the conjecture upon which plaintiff commenced, tried and won the case, I am content to close with the observation that the decisions of the Supreme Court of the United States forbidding a jury to speculate on cause of accident are so numerous citation of them is superfluous.

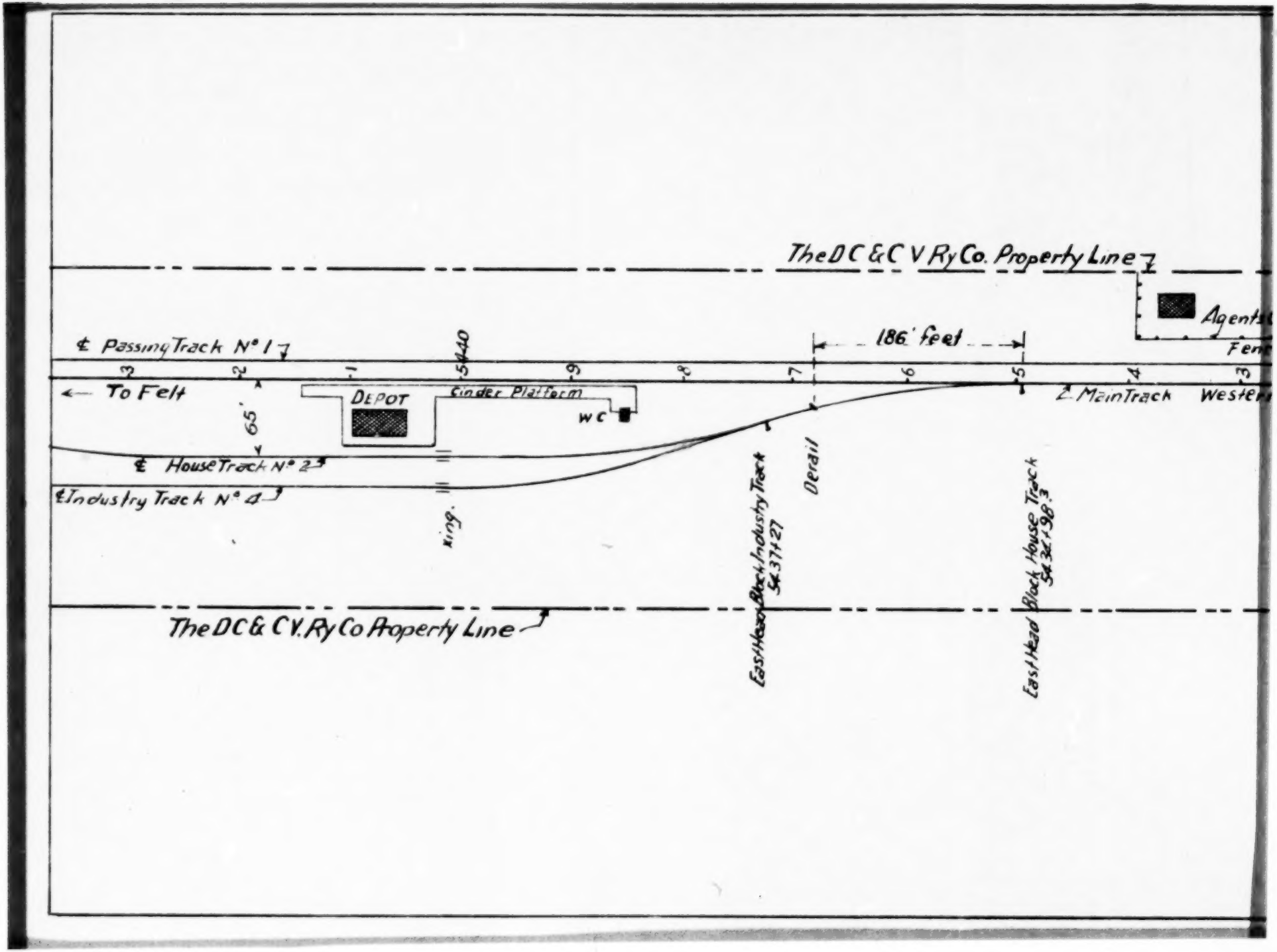
The reasoning of Mr. Justice Burch in the dissenting opinion in our judgment wholly demolishes the reasoning of Mr. Justice Hopkins in the majority opinion.

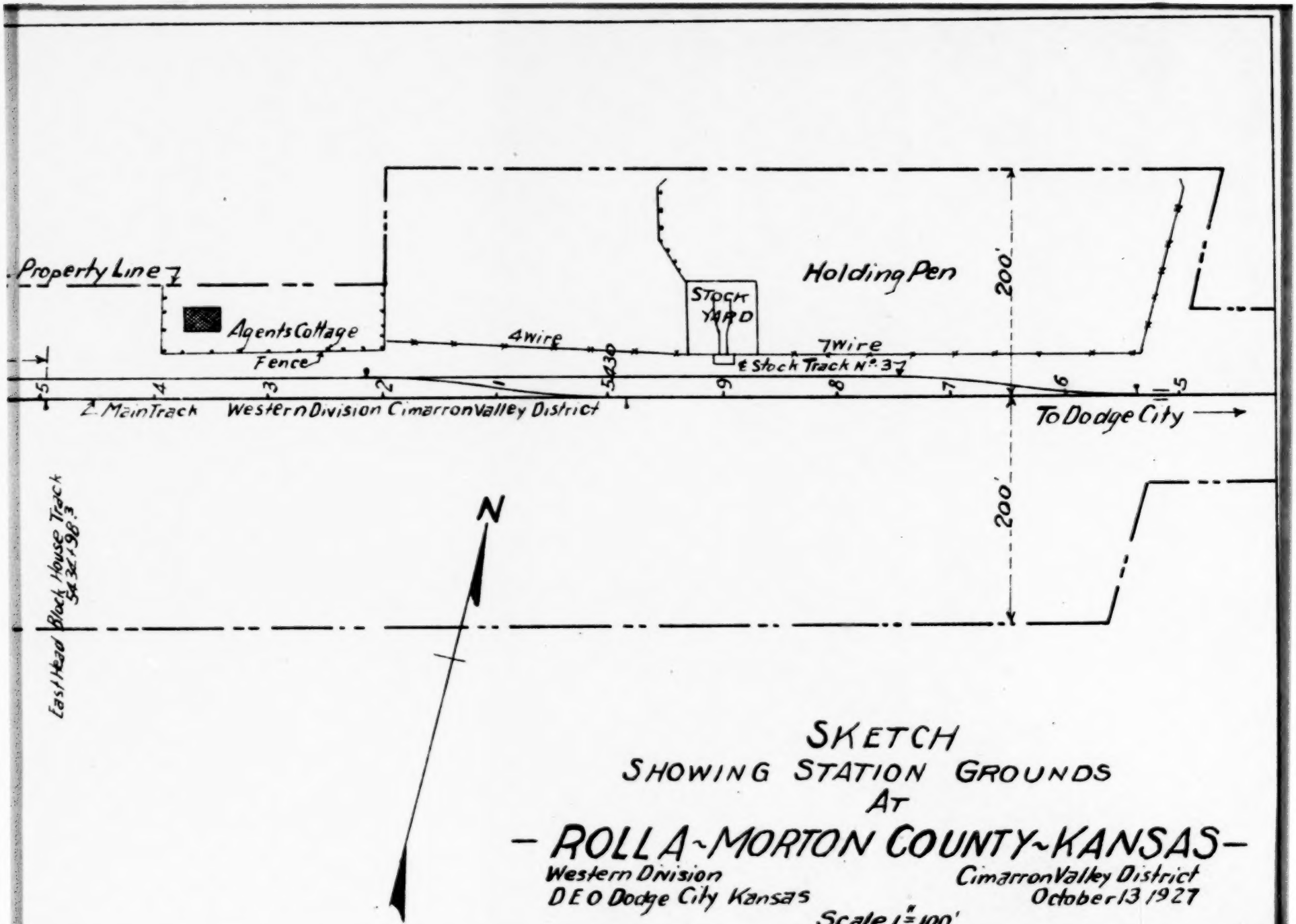
Every point is considered by Mr. Justice Burch and no more persuasive brief or argument can be made on behalf of the petitioner than is contained in this opinion.

We respectfully pray that the judgment of the Kansas Supreme Court may be reversed.

E. E. McINNIS,
Chicago, Illinois,
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas,
WILLIAM OSMOND,
Great Bend, Kansas,
Counsel for Petitioner.


℄ Passing Track No 1
To Felt
DEPOT
65'
℄ House Track No 2
℄ Industry Track No 3
The DC & C.V. Ry Co Property Lin


The D C & C V Ry Co. Property Line
℄ Passing Track N° 1
186' feet
← To Felt
DEPOT
Cinder Platform
WC
℄ Main Track
65'
℄ House Track N° 2
℄ Industry Track N° 4
Derail
East Head Block Industry Tract
Sec 37 T 27
East Head Block House Track
Sec 32 T 98.3
The D C & C V. Ry Co Property Line



SKETCH
SHOWING STATION GROUNDS
AT
— ROLLA ~ MORTON COUNTY ~ KANSAS —

Western Division
D E O Dodge City Kansas

Cimarron Valley District
October 13 1927

Scale 1" = 100'